UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOVIE CARL MATHIS, Petitioner and Appellant, vs. LOUIS S. NELSON, Warden, California State Prison, Tamal, California, Respondent and Appellee.	No. 22469

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

EDWARD P. O'BRIEN
Deputy Attorney General

ROBERT R. GRANUCCI
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1959

Attorneys for Respondent-Appellee

TOPICAL INDEX

TABLE OF CASES

TEXTS, STATUTES AND AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOVIE CARL MATHIS, Petitioner and Appellant, vs. LOUIS S. NELSON, Warden, California State Prison, Tamal, California, Respondent and Appellee.	)	No. 22469

APPELLEE'S BRIEF

JURISDICTION

Appellant, seeking review of an order of the district court denying his petition for a writ of habeas corpus invokes the jurisdiction of this Court under Title 28, United States Code section 2253.

STATEMENT OF THE CASE

A. Proceedings in the state courts.

After jury trial in the Superior Court of Santa Clara County, appellant Dovie Carl Mathis, petitioner below, was convicted of murder in the first degree and after a trial on the issue of penalty, was sentenced to death. On his automatic appeal to the Supreme Court of California, appellant's conviction and sentence were affirmed. People v. Mathis, 63 Cal.2d 416 (1965).

Appellant's application for a writ of certiorari to review this decision was denied on October 10, 1966. Mathis v. California, 385 U.S. 857 (1966).

Habeas corpus petitions addressed by appellant to the Supreme Court of California were denied on January 19, 1966, and November 23, 1966 (TR 5-6).[1/]

B. Proceedings in the federal courts.

On November 29, 1966, appellant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California (TR 1). On November 29, 1966, District Judge Albert C. Wollenberg issued an order to show cause and the following day, appointed counsel to represent appellant (TR 65, 66).

On December 2, 1966, Lawrence E. Wilson, at that time the warden of San Quentin prison, appellee's predecessor and respondent below, filed a return to the order to show cause (TR 67).

On December 13, 1966, the district court issued a stay of execution and ordered an evidentiary hearing (TR 143).

An evidentiary hearing was held on February 10, 1967, following which the parties filed briefs and the

---

1. "RT" refers to the transcript of record filed in this Court.

matter was submitted for decision.

On September 29, 1967, the district court entered an order denying appellant's application for the writ and discharging the previously entered stay of execution, it being further ordered that the order discharging the stay was itself stayed for a period of sixty days in order that petitioner might if so advised have time to undertake an appeal.[2/] (TR 211, 224).

On November 27, 1967, the district court granted appellant's motion for leave to proceed in forma pauperis and certified that there was probable cause for his appeal (TR 225, 226). Notice of appeal was filed that same day (TR 228).

STATEMENT OF FACTS

The facts which gave rise to petitioner's conviction were fully stated in the Supreme Court of California (TR 75-119), from which we quote as follows:

> "The two defendants [appellant Mathis and Billy Clyde Still, his accomplice] were convicted of killing Vernon Ray in the process of robbing him of approximately $600 which he had on his person. The events took place on the

---

2. A copy of the opinion of the district court is attached hereto as "Exhibit A."

evening of Saturday, October 19, 1963, and the early morning hours of Sunday, October 20, 1963, after Ray had displayed a large amount of cash in the presence of a waitress at Fisher's bar in San Jose. Ray had been in the bar early Saturday evening and had left shortly before 8 p.m.

"Bill Still arrived at Fisher's bar sometime during the evening after Ray had left, and heard tales of the money from the waitress. Mathis arrived later, and Still recounted the story to him, calling upon the waitress to confirm it. Testimony was offered which established that both defendants were in financial straits that evening.

"Sometime after midnight Mathis proposed that the two leave the bar. He then drove Still to the home of his sister in San Jose where they admitted themselves with Mathis's key and telephoned Ray. Mathis told Ray that his car was stuck in the mud in Alum Rock Park, in San Jose, and asked Ray to drive to the park and pull him out with his pickup truck. Ray agreeably consented and, upon informing

his wife and guests of his intentions, left his home about 1:30 a.m.

"Mathis and Still then drove to Alum Rock Park, positioned their automobile off the road and waited for Ray who arrived momentarily. Mathis, meanwhile, had instructed Still to take the revolver he had in his car and hit Ray over the head with it at an appropriate moment. Still objected to the use of the revolver, so Mathis then proposed that Still use a tire wrench which he obtained from the trunk of his car. Still took the wrench and hid in the bushes nearby.

"When Ray arrived he backed his truck to the Mathis car, connected a line between the two vehicles, and attempted to tow the car. Mathis, however, placed his foot on the brake of his car to create the impression that the car was stuck. He eventually released the brake allowing Ray to pull the car free, whereupon Ray got out of his truck and proceeded to release the cable. At that moment, as Ray bent over the towline, Still crept up from behind and hit him over the head with the tire iron.

Ray was stunned, but not unconscious, and fled to a nearby creekbed. Mathis and Still chased him, and Mathis caught him at a point a quarter of a mile up the creek. A scuffle ensued during which Mathis knocked Ray unconscious with a large rock. He then told Still to get the money from Ray's pocket, and this Still did. Mathis then administered the coup de grace by striking several frontal blows to the head of the supine victim with either the same or another large rock.

"The two then departed from the scene, Still, driving Ray's truck, using a pair of gloves furnished by Mathis, and Mathis driving his own car. Mathis returned to the apartment in East Palo Alto where he lived with a young woman named Kathy Taylor, arriving about 3 a.m. He complained of an injured thumb, telling Kathy that he had been a fight and that if anyone inquired she was to say that he had been home since 8 p.m. that evening.

"Mathis and Still met on Sunday morning and disposed of the clothes they had worn the previous night by throwing them into the bay.

About 3 p.m. Sunday, Mathis was arrested by San Mateo County sheriff's deputies and taken to the Redwood City jail where San Jose police officers questioned him. Mathis told them he had been home all night, and Kathy confirmed his story. He was then taken to San Jose for further questioning until about 11 p.m., when he was allowed to sleep. At the time he was arrested Mathis's thumb appeared to be split, but he had no other serious injuries. He told officers that he had caught his thumb in the door of his car.

"On Monday morning the interrogation resumed about 8:30 a.m. and Mathis continued to deny all, even when told that Kathy had changed her story and had admitted that he had not returned home until 3 a.m. During the course of the interrogation Monday morning Mathis requested to see his attorney. He was then being represented by Cyril Ash, a San Jose attorney, in another criminal matter. The officers attempted to telephone Ash, but his line was busy. The questioning continued.

"At 11 a.m. Monday, Still was arrested

and immediately gave a complete statement to the police implicating Mathis as the major perpetrator of the crime. Confronted with the evidence the police now possessed, Mathis again requested to see his attorney and again the police placed a call to Ash's office, this time reaching his secretary who told them the attorney was in court. The officer left word for Ash to call the police department in regard to a client who wished to see him. Following this call Mathis agreed 'to tell the truth,' and a recorded statement was taken from him. That statement was later introduced at the trial.

"The statement which Mathis gave, however, was neither a confession nor the truth. It was an attempt to absolve himself from both the robbery and the murder by casting suspicion upon a third individual. Mathis told the police that although he had been in Alum Rock Park and had parked his car off the road as though stuck, he had done so at Still's suggestion; that he had merely accompanied Still at the latter's importuning and had no idea what

Still planned to do about Ray's money; that while Ray was hooking up the tow cable, a mysterious stranger appeared from the bushes and, confusing him with Ray, hit him, Mathis, over the head, rendering him unconscious; that the stranger and Still then robbed and killed Ray. He indicated that the stranger resembled a person named Larry Jones he had seen talking with Still at Fisher's bar.

"The police then apprehended Jones, who was held for a brief period and released when his alibi was substantiated. During the remainder of the investigation Mathis gave no further statements, and, during a trip to the scene of the crime with Still, he urged Still not to cooperate with the police, reminding him that he had no duty to do so.

"At the trial the recorded statement was used to discredit the appellant's veracity. The prosecution demonstrated that the exculpatory elements of the story were fabrications. Mathis, testifying on his own behalf, admitted enticing Ray into the park, but said it was part of a plan devised with Mrs. Ray to test

Ray's fidelity to his wife. He said that he was surprised when Still hit Ray over the head. He denied giving Still the tool and said that Still had disappeared into the bushes as soon as they had parked the car and that he assumed it was because Still needed to relieve himself. According to Mathis, Still did not hit Ray hard enough to knock him unconscious and Ray had then taken the tool from Still and charged after Mathis while uttering oaths about Mathis 'playing around' with his wife. Mathis said he ran to the creek where Ray eventually caught up with him. Ray attempted to hit him several times while Mathis protested that he did not want to fight. After warding off several blows Mathis managed to trip Ray, who fell into the creek. Mathis said he then picked up a rock and hit Ray once on the back of the head and then ran from the scene. He said that Still had apparently followed them down to the creek, waited until Mathis hit Ray and ran, and then had taken Ray's money and killed him.

"Appellant testified he had given a false

statement to the police because he was tired and depressed, wanted to see his lawyer, and thought that if he told a story that brought a new suspect into the investigation he would gain some time and relief from the questioning.

"At the penalty phase of the trial the prosecution asked for the death penalty for Mathis but not for Still. Two character witnesses testified to instances of prior violence by Mathis for which he had been convicted. The district attorney stressed that Mathis had tried to implicate an innocent man in this crime." 63 Cal.2d at 419-422.

In the proceedings below, appellant's principal contention was the the extrajudicial statement of October 20, 1963, described in the California Supreme Court opinion, supra, was involuntary and therefore its admission at the state trial worked a denial of due process of law. In its opinion, the district court summarized the circumstances surrounding that confession as follows:

"The crime of which petitioner was convicted took place around 1:30 a.m. on October 20, 1963. Petitioner was arrested at

about 3:00 p.m. that same day. After being arrested he was taken to the San Mateo County jail in Redwood City, and questioned by the San Jose police for about half an hour. Petitioner at this time told police that he had been home all night and knew nothing about the crime. About 6:00 p.m. he was taken from Redwood City to the San Jose Police Station, and from 7:00 p.m. to 11:00 p.m. he was questioned further. His story that he had been home all night did not change. At 11:00 p.m. he was taken to the Santa Clara City Jail, and was left alone until 8:00 a.m. the next morning, Monday, October 20, 1963. At this time he was taken back to the San Jose police department and questioned further. All morning he stuck to his alibi that he had been home all night.

"Sometime after noon petitioner changed his story, and at 2:45 p.m. he made a formal statement to the police which was transcribed on a recording disc with his knowledge. In this statement he retracted his first story and admitted being at the scene of the crime at the time of the crime, but said that he was

not responsible for the murder and gave an elaborate explanation about what happened. At trial petitioner took the stand and told a third story regarding the events which took place at the scene of the crime and repudiated many of the points set forth in the statement referred to above. The statement was introduced at trial and the disc recording played to the jurors for the purpose of putting petitioner at the scene of the crime and as evidence of prior inconsistent statements." (TR 212-213).

APPELLANT'S CONTENTIONS

1. The district court was in error when it concluded that petitioner's extrajudicial statement was not involuntary.

2. The district court erroneously concluded that no constitutional rights of appellant were violated by references to the Alum Rock Park re-enactment.

3. The district court erroneously refused to apply the Escobedo rule[3/] to this case.

/

/

---

3. Escobedo v. Illinois, 378 U.S. 478 (1964).

SUMMARY OF RESPONDENT'S ARGUMENT

I. The district court correctly found that appellant's statement was voluntary.

II. No prejudice to appellant resulted from the incidental comment on his failure to participate in a re-enactment of the crime.

III. The district court was not required to apply the Escobedo rule to petitioner.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY FOUND THAT APPELLANT'S STATEMENT WAS VOLUNTARY

Appellant's principal contention on this appeal is that his extrajudicial statement of October 21, 1963, was involuntary in that it was the product of psychological coercion. Before addressing ourselves directly to this contention, we would note, however, that this Court is not called upon to try the issued of voluntariness de novo, but rather to determine the decision of the district court was correct. This decision comes before this Court buttressed by a double presumption of correctness. First, Rule 52(a) of the Federal Rules of Civil Procedure provides that on appeal findings of fact shall not be set aside unless clearly erroneous and that due regard shall be given to the opportunity of the trial

court to judge the credibility of the witnesses. This rule has been applied by this Court in habeas corpus cases in analogous situations where the district court, after a hearing, has found that a plea of guilty was voluntarily entered. See Knowles v. Gladden, 378 F.2d 761 (9th Cir. 1967); Barber v. Gladden, 327 F.2d 101 (9th Cir. 1964).

In addition to the above-noted presumption, a separate and distinct presumption of correctness applies in this case by virtue of Title 28, United States Code section 2254(d). That section provides that in a habeas corpus proceeding instituted in a federal court by a state prisoner, a determination after a hearing on the merits of the factual issue made by a state court of competent jurisdiction in which the applicant and the state were parties, shall be presumed to be correct if the federal court is satisfied that the petitioner had a fair opportunity to present his side of the issue in the state court, and that the procedure afforded him by the state was adequate to afford him a full and fair hearing. The legislative history of this section shows that it was intended by Congress to provide a qualified application of the doctrine of res judicata and create reasonable presumptions in federal habeas corpus cases where

state convictions were under collateral attack. See Cong. Record, Vol. 112, pp. 4887, 4895 (1966).

In the present case, the district court in addition to hearing testimony on the issue of voluntariness, reviewed the record of petitioner's trial and the opinion of the Supreme Court of California (TR 213-214). Such review convinced the district court that the Supreme Court of California gave careful consideration to all claims of error advanced by petitioner, including his claim of involuntariness, and that for the reasons stated in the opinion they were found without merit. Since the district court found no deficiencies in the state fact-finding process, the presumption of correctness provided in section 2254(d) applied to the state finding of voluntariness. Clearly that presumption was in no way vitiated when the district court, out of solicitude for the rights of the appellant, exercised its discretion to hold an evidentiary hearing and reached a conclusion identical to that reached in the state courts.

Thus, the question presently before the court is whether there is any legal reason why, as the United States Supreme Court did in Davis v. North Carolina, 384 U.S. 737 (1966), this Court should hold appellant's extrajudicial statement involuntary as a matter of law.

We respectfully submit that there is none. Although petitioner cites Bram v. United States, 168 U.S. 532 (1897) for the proposition that confronting a suspect with the accusations of his accomplice is inherently coercive he correctly notes that this theory has been superseded by at least two more recent decisions of the Supreme Court. See Stein v. New York, 346 U.S. 156 (1953) overruled on another point in Jackson v. Denno, 378 U.S. 368 (1964); and Cicenia v. Lagay, 357 U.S. 504 (1958), overruled as to another point in Miranda v. Arizona, 384 U.S. 436 (1966). In fact, however, the rationale of Bram seems to be that under the circumstances present in that case the very process of putting questions to the defendant was inherently coercive because the circumstances suggested to the defendant that he was required to answer. This rationale has been squarely rejected by the Supreme Court.

> ". . . [T]his Court (in cases coming here from the lower federal courts), the courts of England and of Canada, and the courts of all the States have agreed in holding permissible the receipt of confessions secured by the questioning of suspects in custody by crime-detection officials. And, in a long series of

cases, this Court had held that the Fourteenth Amendment does not prohibit a State from such detention and examination of a suspect as, under all the circumstances, is found not to be coercive." Culombe v. Connecticut, 367 U.S. 568, 589-591 (1961). (Footnotes omitted).

For purposes of this proceeding, we think the best argument that we could make in answer to appellant's claim of psychological coercion has already been made by the district court. After carefully reviewing the record of the state trial and the opinion of the Supreme Court of California, hearing the testimony of witnesses, examining the exhibits, and finally listening to approximately ten hours of tape recordings, that court prepared a thoroughgoing opinion which we submit so convincingly answers petitioner's claim of psychological coercion that we can do no more than submit it to this Court as our argument on the issue. Therefore, we respectfully incorporate by reference as our argument on the point the appended opinion of the district court and we urge this Court to follow it.

/

/

/

II

NO PREJUDICE TO APPELLANT RESULTED FROM THE INCIDENTAL COMMENT ON HIS FAILURE TO PARTICIPATE IN A RE-ENACTMENT OF THE CRIME

As noted in the opinion of the district court, as well as that of the Supreme Court of California, on the day after petitioner made the extrajudicial statement that he had been at Alum Rock Park on the night of the murder, the investigating officers took him along with Billy Still, his accomplice where Still re-enacted his part in the crime (RTST 725-732).[4/] Still was eager to cooperate with the officers and re-enacted his portion in the crime (RTST 698). Appellant on the other hand, after commencing to act out his part, refused to cooperate in the re-enactment and then refused and told Still that he did not have to do anything either (RTST 801). Petitioner now characterizes this incident as "a mute participation," although that term is a misnomer. Actually, appellant's conduct was a refusal to participate. Before the district court and here on appeal, petitioner characterizes this as a coerced admission by silence and further states that at the trial the

---

4. "RTST"refers to the reporter's transcript of the state trial introduced in evidence before the district court, Docket Entry 22.

prosecution introduced this "mute participation" into evidence and argued therefrom that petitioner's silence in the face of such accusations constituted in effect an admission that the accusations were undeniable.

We think that the district court effectively answered this argument by stating as follows in its opinion:

> "A thorough examination of the trial transcript reveals no place where anyone argued that petitioner's silence or refusal to participate should raise an inference of any kind of admission. Petitioner was not cross examined on this point. There are only two places in the prosecution's argument where the incident was even referred to. The first time, p. 1514 of the trial transcript, the reference was tangential to a point about the general consistency of Billy Still's various statements. The second time, at page 1544 of the trial transcript, the reference was in connection with the series of inconsistencies in the statements of petitioner Mathis. No objection was made by petitioner's counsel either time, and this Court finds no prejudice

whatever to petitioner in either of the references during argument or when these facts were first adduced." (TR 223).

Moreover, it should also be noted that if there has been an argument to the effect that Mathis' silence, when he was obviously standing on his rights, was to be taken as an admission of guilt such argument would have been clearly erroneous under California law. See People v. Simmons, 28 Cal.2d 699 (1946). However, the testimony was elicited and the passing comments made without any objection on petitioner's behalf. When he failed to object at the trial, he bypassed a readily available state remedy and therefore is now in no position to complain of the point on federal habeas corpus. See Nelson v. People, 346 F.2d 73 (9th Cir. 1965).

III

THE DISTRICT COURT WAS NOT REQUIRED TO APPLY THE ESCOBEDO RULE TO PETITIONER

Appellant's final contention is that despite the clear holding to the contrary in Johnson v. New Jersey, 384 U.S. 719 (1966), the Escobedo rule applies to his case. His argument, while not easy to follow, seems to be that because the California Supreme Court applied the Escobedo test, it therefore did not consider the coercion issue and petitioner did not receive a fair

appeal. There are several answers to this argument but the one that comes most readily to hand is that this Court is not sitting in review of the decision of the Supreme Court of California on petitioner's state court appeal, although as we have noted earlier, that decision is entitled to a strong presumption of correctness. The subject of this appeal is the decision of the district court after an evidentiary hearing in which the issue of voluntariness was thoroughly litigated.

Secondly, despite appellant's contentions to the contrary, the Supreme Court of California did review the voluntariness of the aspect of the case and stated that "an examination of the record discloses no question of that nature present." People v. Mathis, supra, 63 Cal.2d at 431, n. 7. (TR 96).

In any event the most dispositive answer to petitioner's contention is that the United States Supreme Court is the final arbiter of the scope of a newly announced constitutional rule. That Court has unequivocally declared that the Escobedo rule does not apply to cases that went to trial prior to the date of that decision.

/

/

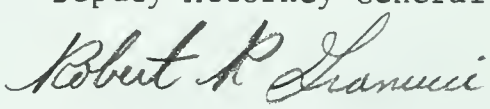
CONCLUSION

We respectfully submit that the order of the district court denying appellant's petition for a writ of habeas corpus should be affirmed.

Dated: April 22, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

EDWARD P. O'BRIEN
Deputy Attorney General



ROBERT R. GRANUCCI
Deputy Attorney General

RRG:pp

CR SF
66-1812A

CERTIFICATE OF COUNSEL

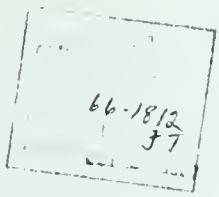
I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: April 22, 1968

Robert R. Granucci

ROBERT R. GRANUCCI
Deputy Attorney General

E X H I B I T



IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

- - - - - - -

DOVIE CARL MATHIS, Petitioner, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California, Respondent.	Case No. 46059 ORDER DENYING WRIT OF HABEAS CORPUS, DISCHARGING STAY OF EXECUTION HERETOFORE GRANTED AND ORDER FURTHER STAYING EXECUTION.

This is a petition for a writ of habeas corpus. Petitioner is incarcerated by the State of California pursuant to jury verdicts finding petitioner guilty of murder in the first degree and robbery in the first degree, and fixing the penalty at death. An order to show cause was issued, the execution of petitioner's death sentence was stayed, petitioner was appointed counsel, and a full evidentiary hearing was held, at which petitioner was present and testified.

The crime of which petitioner was convicted took place around 1:30 a.m. on October 20, 1963. Petitioner was arrested at about 3:00 p.m. that same day. After being arrested he was taken to the San Mateo County jail in Redwood City, and questioned by the San Jose police for about half an hour. Petitioner at this time told police that he had been home all night and knew nothing about the crime. About 6:00 p.m. he was taken from Redwood City to the San Jose Police Station, and from 7:00 p.m. to 11:00 p.m. he was questioned further. His story that he had been home all night did not change. At 11:00 p.m. he was taken to the Santa Clara City Jail, and was left alone until 8:00 a.m. the next morning, Monday, October 20, 1963. At this time he was taken back to the San Jose police department and questioned further. All morning he stuck to his alibi that he had been home all night.

Sometime after noon petitioner changed his story, and at 2:45 p.m. he made a formal statement to the police which was transcribed on a recording disc with his knowledge. In this statement he retracted his first story and admitted being at the scene of the crime at the time of the crime, but said that he was not responsible for the murder and gave an elaborate explanation about what happened. At trial petitioner took the stand and told a third story regarding the events which took place at the scene of the crime and repudiated many of the points set forth in the statement referred to above. The statement was introduced at trial and the disc recording played to the jurors for the purpose of putting petitioner at the scene of the crime and as evidence of

prior inconsistent statements.

Petitioner's contention and ground for relief in this Court is that the 2:45 p.m. statement was not given to the police voluntarily, and that when this statement was used against him at trial, petitioner's right to be protected against self-incrimination was violated.

Petitioner alleges that he suffered a series of personal and physical acts of abuse from the police while in their custody. He alleges that at the time he agreed to give the statement he was in a weakened condition and suffering from lack of food, the influence of alcohol, fatigue, pain from wounds suffered the day before, more pain from the extraction of a sample of blood and the extraction by the police of several hairs from his head by the roots on the evening of October 20. He alleges that he was not permitted to contact a lawyer, and was subjected to debilitating police interrogation methods by physically and mentally superior police officers.

Petitioner alleges that the abusive treatment and the forceful interrogation coerced him, in his weakened condition, into giving the 2:45 p.m. statement involuntarily.

Petitioner's conviction was appealed before the Supreme Court of the State of California. In its opinion affirming the conviction and sentence, the Court referred to the involuntary confession issue now before this Court as follows:

> "Although appellant has alluded to the additional issue of voluntariness, an examination of the record discloses no question of that nature present. Voir dire examination of the interrogators

> revealed no instances of mistreatment with the possible exception of the medical attention given to appellant's thumb. However, appellant never complained that the pain caused by that injury prompted him to give the statement. Additionally, appellant had been in custody for only 24 hours when he made the statement and had been allowed eight or more hours of sleep." People v. Mathis, 63 Cal.2d 416, 406 P.2d 65, 46 Cal. Rptr. 785 (1965), 46 Cal. Rptr. at 794 f.7.

It is evident from the above quotation and the remainder of the opinion, that the Supreme Court of the State of California gave careful consideration to all claims of error advanced by petitioner, and for reasons stated therein found them to be without merit.

However in view of the nature of the claims raised and the existence of pertinent United States Supreme Court case law which has succeeded the conviction and appeal in the California courts, this Court ordered an evidentiary hearing and has reviewed the record of this case in its entirety in reaching its own conclusions.

One issue in this case, the distinction between the prejudice caused by an exculptory statement versus an inculpatory statement, has been determined in Miranda v. Arizona, 384 U.S. 436 (1966). In that case the Supreme Court ruled that such a distinction between the two can no longer be made. Accordingly this Court will treat the 2:45 p.m. statement as being clearly incriminating.

During the entire time petitioner was being questioned in the interrogation room at the San Jose police department on October 20 and October 21, the conversations between petitioner and police were being tape recorded, and these recordings were admitted into evidence at the evidentiary hearing before this Court (Exhibits 1 through 6). This Court has listened to all of the recordings prior to and during the time the 2:45 p.m.

statement was taken from petitioner, and most of the remaining tapes introduced. The accuracy of the tapes is not disputed.

With regard to the allegations of abusive treatment and weakened condition, this Court finds as follows: Petitioner was fed only one sandwich between the time of his arrest and his 2:45 statement. He was given this sandwich around noon on October 21. Other than petitioner's testimony there was no evidence that the lack of food could be attributed to an attempt of the police to starve petitioner. There was never a time anywhere on the tapes when petitioner asked for food. Nor on the tapes was there ever a time when the police withheld food on the condition that petitioner make a statement. There was evidence that on the morning of the 21st of October petitioner was offered breakfast at the city jail. Several places on the tapes petitioner while referring to his activities after he had arisen from bed on Sunday morning, October 20, stated that he never ate breakfast; this would account for his refusal to eat breakfast on October 21.

Petitioner's allegation that he was inebriated is not born out by the evidence. At 9:10 p.m. on the evening of October 20, a sample of blood was taken from petitioner. When analyzed this blood showed an alcohol content of .02%. See p. 501 and p. 554 of the trial transcript. Thus whatever petitioner's condition when he was arrested, by the morning of October 21 he could not have been suffering from the effects of alcohol. Even on Sunday evening the tapes indicate that petitioner's elocution was not hampered at all, and he never wavered regarding the details of his story. Thus whatever the state of petitioner's mind shortly before his 2:45 p.m. statement, it was not the result of alcohol.

Petitioner was without the benefit of advice of any lawyer during the entire period of his interrogation. The tapes have recorded two separate occasions on which he sought the opportunity to talk to his lawyer. On the first the police refused. On the second, which occurred just before petitioner gave his 2:45 p.m. statement, the police officer who had been interrogating petitioner telephoned the office of petitioner's lawyer but was unable to reach the lawyer. Petitioner alleges that he made many more requests to see his lawyer outside the interrogation room and earshot of the tape recorder.

Petitioner's trial began on April 21, 1964 before both Escobedo v. Illinois, 378 U.S. 478 (June 22, 1964) and Miranda v. Arizona, 384 U.S. 436 (June 13, 1966). Thus under the rule established in Johnson v. New Jersey, 384 U.S. 719 (1966), the constitutional right to have a lawyer when police exercise custody over a person and the right to be informed of this do not apply retroactively to petitioner Mathis. On the other hand the lack of counsel during police interrogation is an important factor to be considered in deciding whether a given statement has been coerced. Davis v. North Carolina, 384 U.S. 737 (1966). Thus the issue before the Court in this connection is the extent to which petitioner's lack of counsel had a coercive effect in producing petitioner's 2:45 p.m. statement.

Two facts tend to refute petitioner's allegation that the lack of a lawyer infected the voluntariness of his statement. On the evening of the 21st, petitioner and two other men agreed to make a jointly recorded statement of their conflicting versions of what

happened. At the time of this jointly recorded statement petitioner referred to his request to talk to his lawyer just before making the 2:45 p.m. statement, and said that before he had given the 2:45 p.m. statement he had asked for his lawyer, but thereafter had decided to give the statement anyway. The comment says by itself what can be gleaned from listening to the tape. Petitioner was putting together a story which would save him from a murder charge. Not to insist on talking to his lawyer might make the statement more believable. But the correlary inference is that giving the statement was not tied to the lack of presence of counsel.

It may be assumed that had a lawyer visited petitioner before he gave his 2:45 p.m. statement and the usual "don't say anything" advice were given, the statement would not have been elicited. However, prior to the Escobedo decision, supra, police were not required to permit a suspect to see a lawyer when he was arrested. The fact that a prompt summoning of counsel would have saved petitioner from making the 2:45 p.m. statement is not proof that the lack of a lawyer subjected petitioner to coersion. As discussed below, it is the opinion of this Court that petitioner was induced to make the statement from an entirely different circumstance.

Petitioner's allegations regarding pain and suffering from various wounds and police extractions of blood and hair are completely without basis. Petitioner's thumb was injured and given limited treatment. Petitioner was stripped and police looked over his body for any other signs of a scuffle, but found none. Police

were unable to detect any of the alleged gashes on the head and leg and chest at a time when they were energetically searching for this type of a clue. Petitioner registered no complaint regarding this pain to the police on the tapes, but arguably this could be explained by his attempts to avoid being placed at the scene of any altercation. This Court finds that the injuries to the head, the back, and the leg, if they did exist, were minor and were not debilitating, and as such could not have contributed significantly to petitioner's alleged fear, fatigue and confusion.

The police did admit that on Sunday evening they took a sample of blood from petitioner and that they pulled several hairs from his head by the roots. Petitioner had given permission to the police to take these samples, and he never complained on the tapes regarding the taking of these samples. Whatever pain petitioner suffered on these occasions was temporary and did not persist to the next morning.

With regard to the interrogation by police, petitioner alleges that, "Throughout the interrogation, the police used every method available to them, short of outright violance, to coerce the petitioner into making the statements he ultimately made. The police frightened him, tired him, and verbally abused him throughout the interrogation period." It is clear from the tapes that the questions asked by police were directed towards getting a statement which incorporated some of the evidence they had against petitioner. However until his 2:45 p.m. statement petitioner did not change his alibi that he was home all night and that his thumb was smashed in a car door.

The questions asked by police were not asked in a confusing manner or in a heated or vengeful manner. The questions and answers centered on the subject of exactly what petitioner had been doing and where he had gone all day Saturday, October 19 and Sunday, October 20. Much of the time was spent hashing through petty details. A constant subject of the questioning was a hat found near the murdered man's body, which police suspected belonged to petitioner. The explanation given by petitioner for the injury to his thumb was gone over by police time and time again. Petitioner was also repeatedly questioned regarding the source of some money he was supposed to have given a woman with whom he had been living. It is clear that the police were attempting to break down petitioner's first story and to trap him into self-contradiction.

Petitioner alleges that he was induced to make the 2:45 p.m. statement by promises that he would be charged with a lesser crime than murder if he made a statement. The tapes do show that the police were attempting to obtain from him a statement admitting that he had some connection with the crime. The method used was to suggest that if there were some self-defense aspect to the incident, the charge could be less than first degree murder, but that on the basis of the information they had at that time (that petitioner had lured the victim, known to carry a large amount of cash, to a secluded area) the charge would be murder under the felony murder rule. However, what was said by the police never amounted to a promise of any kind. The statements of the police were essentially informative.

In addition, petitioner never responded to these alleged promises. As discussed below, the statement given by petitioner did not incorporate the idea of self-defense, but placed the blame for the murder on some other person. The statement was responsive to the information that a cohort of petitioner's had been arrested and had confessed and directly implicated petitioner.

Petitioner alleges also he felt threatened with bodily harm and intimidated by the police deprication of continually calling him "nigger". The tapes do not substantiate either of these charges. The police denied these allegations, specifically. This Court finds that petitioner's testimony in support of these allegations was completely untrue.

Petitioner alleges that police used threats against Kathy Taylor, the girl with whom he was living at that time, to wear down his resistence. There were many references to Miss Taylor, but in many different contexts, only one of which included the possibility that she might be involved in the crime. This Court finds that neither the relation between petitioner and this woman, nor the particular reference to her were such as to in any way affect the voluntariness of petitioner's statement. This Court finds that petitioner's allegation and testimony that his statement was connected with concern for the well-being of Kathy Taylor are a complete falsehood.

Respondent does not deny that during the twenty-four hour period preceeding the 2:45 p.m. statement, petitioner had no contact with the world outside of police departments and jails, although they allege that he had

permission to make any call he wanted Sunday night when he was booked at the city jail. It is likely that this fact and the extensive interrogation did have some effect on petitioner. However, in the opinion of this Court the effect was not such that it coerced the 2:45 p.m. statement out of petitioner.

The remaining question on the involuntary statement issue is whether petitioner's mental and physical condition was such that the eleven hours of interrogation coerced the 2:45 p.m. statement. In this regard, the Court finds it significant that the statement was given to police shortly after they had confronted petitioner with the news that they had arrested Billy Still and that Still had given them a statement admitting participation in the crime and directly implicating petitioner. Petitioner also learned that Still had given police many details of the pair's activities which police could readily check out.

Furthermore, when petitioner did give the 2:45 p.m. statement, he did not simply "spill his guts" but presented police with a carefully contrived story which was intended to be a complete defense to any prosecution for murder and most of which he repudiated at trial as not being true.

All during the interrogation on the morning before he gave the statement, petitioner had parried the police questions firmly, quietly, patiently, and with thorough consistency.

In addition, contrary to petitioner's testimony, the tapes show that he was told by the police, albeit informally, of his right to remain silent several

times before making his 2:45 p.m. statement.

In addition the eleven hours of questioning was not uninterrupted. At different times petitioner was left alone in the interrogation room for periods of 5 to 15 minutes.

Accordingly it is the finding of this Court that the most important factor in causing petitioner to make the 2:45 p.m. statement to police was the confronting him with Billy Still's statement. It is also the finding of this Court that at the time petitioner gave up his first alibi, he was not suffering from unusual fatigue or any confused state of mind. Petitioner gave his statement freely, voluntarily, and without compulsion or inducement of any sort.

Petitioner cites Haynes v. Washington, 373 U.S. 503 (1963) as a case almost identical on its facts with the present one and in which a confession was held to be involuntary. With regard to the facts recited by the United States Supreme Court one significant distinction is that the recital of voluntariness contained in the confession was infected with the promise of the police to let Haynes call his wife, in effect, only after Haynes gave police a statement. Here the recital of voluntariness in the 2:45 p.m. statement contains no such limitation, and on the tape the recital is spoken in a positive, convincing manner. Most significant in rejecting petitioner's comparison of the Haynes case, supra, is the picture this Court, after a careful review of the entire record, has gleaned of petitioner as being quite able to maintain complete control over what he would say and of his right to say nothing during the entire period of police interrogation.

Petitioner has raised one additional issue. During petitioner's trial it was brought out on direct examination of a police officer that petitioner had stood mute and refused to participate in the reenactment of the crime at the scene of the crime. The police initiated the idea of the reenactment, and had obtained Billy Still's cooperation. Petitioner alleges that the prosecution improperly attempted to draw an inference of an admission of guilt from petitioner's silence in the face of the accusations which were inherent in the reenactment by Billy Still and the police's attempt to gain petitioner's cooperation.

A thorough examination of the trial transcript reveals no place where anyone argued that petitioner's silence or refusal to participate should raise an inference of any kind of admission. Petitioner was not cross examined on this point. There are only two places in the prosecution's argument where the incident was even referred to. The first time, p. 1514 of the trial transcript, the reference was tangential to a point about the general consistency of Billy Still's various statements. The second time, at page 1544 of the trial transcript, the reference was in connection with the series of inconsistencies in the statements of petitioner Mathis. No objection was made by petitioner's counsel either time, and this Court finds no prejudice whatever to petitioner in either of the references during argument or when these facts were first adduced.

In view of the above it is ordered that this petition for a writ of habeas corpus must be and hereby is DENIED.

Further, it is hereby ordered that the stay of execution previously ordered by this Court on December 13, 1966 is hereby DISCHARGED.

Further, it is hereby ordered that the above order discharging the stay of execution is stayed for a period of sixty days so that petitioner, if he is so advised, may have time to appeal this order or to initiate further proceedings in this matter.

Dated: September 20, 1967

ALB T. C. HOLLINGSG
United States District Judge